

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION

4 MICHAEL DUPREE, JR. a Colorado Resident
5 MICHAEL DUPREE, SR. and DARLENE DUPREE,
6 his parents, Residents of the Country of Austria,
7
8 Plaintiffs.

9
10 v. Case No. 10-12094

11 CRANBROOK EDUCATIONAL COMMUNITY,
12 JOHN J. WINTER and CHARLES SHAW,

13 Defendants.

14 _____/
15 DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
16 BEFORE THE HONORABLE LAWRENCE P. ZATKOFF
17 United States District Judge
18 733 US Courthouse & Federal Building
19 526 Water Street
20 Port Huron, Michigan
21 Thursday, March 15, 2012

22 APPEARANCES:

23 CHRISTOPHER R. SCIOTTI
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On behalf of the Plaintiffs.

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On behalf of the Defendants.

Dupree v Cranbrook 10-12094

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Defendant's Motion For Summary Judgment 3-15-2012

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C O N T E N T S

IDENTIFICATION	PAGE
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WITNESSES

None.

Defendant's Motion For Summary Judgment	4
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Certificate of Court Reporter	47
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E X H I B I T S

IDENTIFICATION	MARKED	RECEIVED
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None.

Defendant's Motion For Summary Judgment 3-15-2012

1 Port Huron, Michigan

2 Thursday, March 15, 2012

3 11:10 a.m.

4 THE CLERK: Calling case number 10-12094, Dupree
5 versus Cranbrook.

6 THE COURT: Morning, counselors.

7 MR. SCIOTTI: Good morning, Your Honor.

8 THE COURT: Would you please place your
9 appearances on the record.

10 MR. SCIOTTI: Judge, Christopher Sciotti, on
11 behalf of the plaintiff.

12 MR. LINDEN: Good morning, Your Honor. Russell
13 Linden and Tara Mahoney on behalf of all defendants.

14 THE COURT: Okay. Thank you.

15 Mr. Linden, this is your motion is it not?

16 MR. LINDEN: Yes, it is, Your Honor.

17 THE COURT: Okay. I'm going to allow each side 15
18 minutes or so; we're not going to be terribly strict
19 about that. But you may proceed.

20 MR. LINDEN: Thank you, Your Honor.

21 This is the defendant's motion for summary judgment
22 and the facts will establish that summary judgment on all
23 plaintiff's claims are warranted for the following
24 reasons.

25 The claims that the defendants originally filed in

Dupree v Cranbrook 10-12094

Defendant's Motion For Summary Judgment 3-15-2012

1 this case and I use the word "originally," because this
2 case is in an unusual poster, were six claims.

3 There were there are a fraud claim, fraud
4 misrepresentation claim, a breach of contract claim, both
5 those claims under Michigan law.

6 And then there were four federal claims alleged in
7 the original complaint; mail fraud, wire fraud, extortion
8 and RICO.

9 And, Your Honor, the reason I use the term
10 "originally" for purposes of indicating that those claims
11 were pending is when we got the response to our Motion For
12 Summary Judgment, much to our surprise, the plaintiffs had
13 quote, unquote, withdrawn their four federal claims.

14 But I'll proceed for the time being, Your Honor,
15 unless you think differently, to address all those claims
16 in this oral argument.

17 So in this case, Your Honor, the basis for all those
18 claims arise from the fact that one of the plaintiffs,
19 Michael Dupree, Junior, who had attended Cranbrook
20 Educational School, was dismissed from that school on
21 June 1, 2004.

22 The other two plaintiffs in this case are his
23 parents, Michael and Darlene Dupree.

24 The defendants in this case are Cranbrook Educational
25 Community Schools which is where Mr. Dupree was attending

Defendant's Motion For Summary Judgment 3-15-2012

1 school when he was dismissed on June 1, 2004.

2 John Winter, who was then the Dean of Boys School at
3 Cranbrook and Charles Shaw, the head of the upper schools.

4 What's critical for purposes of considering this
5 motion for summary judgment, Your Honor, is Mr. Dupree,
6 Junior, the son, was attending Cranbrook Schools pursuant
7 to an enrollment agreement which was signed by the father.

8 The father was the only party to that contract and
9 the only other party to that contract would have been
10 Cranbrook Schools.

11 THE COURT: Let me just ask you a question about
12 the contract.

13 Is it your position that under this contract, the
14 defendant could dismiss a student for any reason
15 satisfactory to the defendant at any time?

16 MR. LINDEN: Your Honor, that's what the contract
17 provides for.

18 THE COURT: So the answer is yes.

19 MR. LINDEN: Yes. That would be correct, Your
20 Honor.

21 THE COURT: So they could at any time for maybe
22 having facial hair or having an earring that offended
23 somebody or a hair cut that they didn't like, they
24 could dismiss that person under that contract?

25 MR. LINDEN: Under that contract.

Defendant's Motion For Summary Judgment 3-15-2012

1 THE COURT: At any time.

2 MR. LINDEN: That would not prevent that person
3 from otherwise asserting a claim under state or federal
4 law alleging the reasons for actually throwing the
5 student out of school violated the anti-discrimination
6 statute.

7 THE COURT: But you're claiming that that contract
8 gave the defendant, your client, the power to dismiss
9 any student at any time for reasons only satisfactory
10 to the defendant.

11 MR. LINDEN: That is correct, Your Honor.

12 THE COURT: Okay.

13 MR. LINDEN: So the contract besides and the
14 specific language that you're referencing, Your Honor,
15 it says:

16 Cranbrook reserves the right to dismiss at
17 any time if, in its judgment the student is
18 not making an effort, progress or behavior or
19 influence.

20 THE COURT: That's totally up to the defendant to
21 make that determination?

22 MR. LINDEN: Correct, Your Honor.

23 THE COURT: Okay.

24 MR. LINDEN: But the contract also provides that
25 the Dupree's son, just like any other student, had a

Defendant's Motion For Summary Judgment 3-15-2012

1 responsibility for abiding by the policies and
2 procedures stated in the school's handbook.

3 THE COURT: Let's talk about what happened to this
4 person. Let's just call him the plaintiff. The
5 student is the person I'm referring to.

6 As I understand the facts, you can correct me if I'm
7 wrong. That in September of 2003, he entered into his
8 last year at the defendant's school; is that correct?

9 MR. LINDEN: That is correct, Your Honor.

10 THE COURT: Then in the first week of that,
11 starting in September of 2003, he allegedly shared his
12 computer password with another individual; is that
13 correct?

14 MR. LINDEN: Plaintiff claims that in
15 September 2003 he shared his password with another
16 student.

17 THE COURT: He also claims that Dr. Lamm who was
18 the individual who was in charge of that particular
19 aspect of the curriculum knew of this and that within
20 days he then changed his password again. Is that
21 correct?

22 MR. LINDEN: That's the plaintiff's testimony,
23 Your Honor.

24 THE COURT: Okay. Then in March of 2004, he was
25 called into the office or something by the Dean of

Defendant's Motion For Summary Judgment 3-15-2012

1 Boys. He was searched. Is that correct?

2 MR. LINDEN: Well you use the term "search". He
3 was called into the Dean's School -- into the office.

4 The testimony from both the plaintiff's son and the
5 Mr. Winter who was the school official involved in this,
6 noticed there was a pipe in his bag and he was asked if
7 there was a pipe there.

8 To that extent, Your Honor, I guess that could be
9 characterized as a search.

10 THE COURT: So he was searched and some pipe was
11 found. And this was a pipe for smoking and not like a
12 drainage pipe or something like that.

13 MR. LINDEN: That's correct, Your Honor.

14 THE COURT: And so this smoking pipe then
15 implicated him as what? He was, he was -- do I
16 understand then charged with possession of drug
17 paraphernalia?

18 MR. LINDEN: Right.

19 The school handbook which is referenced in the
20 Enrollment Contract which is undisputed was received by
21 the plaintiffs --

22 THE COURT: Okay.

23 MR. LINDEN: -- has a code of conduct and it
24 spells out major school violations. One of the major
25 school violations is possession of drug paraphernalia.

Defendant's Motion For Summary Judgment 3-15-2012

1 THE COURT: I -- in looking at these briefs again
2 yesterday, I could not locate the lab report on this
3 pipe; the evidence showing that it was, in fact, a
4 controlled substance. Do you have that?

5 MR. LINDEN: There was no lab report, Your Honor.
6 The way, the way this process works is as set forth in
7 the handbook, the handbook's Exhibit 2 to our motion
8 for summary judgment, it spells out there's a --
9 there's the rules, there's a procedure by which
10 students are adjudicated for violating those rules
11 through something known as the Conduct Review Board.

12 The Conduct Review Board reviews the evidence and
13 makes a determination whether or not there was a violation
14 of the --

15 THE COURT: You mean this was not sent for any
16 analysis with respect to what the substance was in it?

17 MR. LINDEN: Your Honor, the --

18 THE COURT: We'll take a yes or no.

19 MR. LINDEN: No. No, Your Honor.

20 THE COURT: So then how, how was it determined
21 that this pipe, which is a legal instrument, is it not?

22 A pipe -- just possessing a pipe is not any kind of
23 violation of law or anything like that. How was it
24 determined that this pipe was drug paraphernalia?

25 MR. LINDEN: Your Honor, the rule spells out

Defendant's Motion For Summary Judgment 3-15-2012

1 possession of drug paraphernalia -- to prove it's drug
2 paraphernalia I submit to the Court, you don't have to
3 send out to a lab to substantiate it was used for
4 drugs.

5 THE COURT: Well that's what I'm asking. How do
6 you know it was used for drugs if it wasn't tested?

7 MR. LINDEN: Your Honor, I guess I'm going to
8 quote one of the Supreme Court Justices when it comes
9 to definition of obscenity. You know it when you see
10 it.

11 It's pretty common knowledge what a pipe looks like
12 for smoking marijuana.

13 THE COURT: Well, not to me. It really is not.
14 And I'm not being facetious. It's not to me. A pipe
15 is a pipe.

16 Do you know how many prior Presidents of the United
17 States smoked pipes?

18 MR. LINDEN: Well, I can also think of General
19 McArthur. So I understand that, Your Honor.

20 THE COURT: There's nothing wrong with smoking a
21 pipe is there?

22 My question is how do you know and how was it
23 determined that this pipe had contained some sort of
24 illegal substance?

25 MR. LINDEN: Again, Your Honor, the rule was not

Defendant's Motion For Summary Judgment 3-15-2012

1 possession of a paraphernalia that contained illegal
2 substance.

3 The rule says possession of drug paraphernalia.

4 THE COURT: Well, how do you know it's drug
5 paraphernalia if it wasn't tested for drugs?

6 MR. LINDEN: Well again, Your Honor, you don't
7 know. But, again, there are -- there's drug
8 paraphernalia and there's things that are not used for
9 drugs paraphernalia.

10 THE COURT: I guess.

11 MR. LINDEN: It's clear -- it's clear here.

12 THE COURT: How do you know, though? I guess I'm
13 really at a loss. How would you know what pipe is used
14 for smoking a controlled substance and what pipe is
15 used for Bunker Hill tobacco?

16 MR. LINDEN: The fact of the matter is, Your
17 Honor, he was found to have possession of a pipe. He
18 admitted it was in his possession.

19 THE COURT: He also said it wasn't his.

20 MR. LINDEN: Correct. Which is no surprise. But,
21 nevertheless, Your Honor, there's a process set forth
22 in the handbook.

23 THE COURT: Okay.

24 MR. LINDEN: There's an ability to go through a
25 process to challenge the determination; that never was

Defendant's Motion For Summary Judgment 3-15-2012

1 done by any of the plaintiffs.

2 THE COURT: So as I understand it then in March he
3 was searched. There was a pipe -- a smoking pipe found
4 in his possession which he denied was his.

5 Based on that finding, somebody made a ruling that
6 this was drug paraphernalia without any scientific
7 investigation or laboratory analysis of this.

8 I just want to make sure I understand the facts. Is
9 that correct?

10 MR. LINDEN: Well as concerns -- that, that's a
11 fairly conclusory summary of the facts that don't,
12 don't take in total a lot of the, the critical things;
13 such as who was on the Conduct Review Board that made
14 the determination, Your Honor.

15 THE COURT: Was there any expert in controlled
16 substances on that review board?

17 MR. LINDEN: There was no requirement, Your Honor,
18 that there had to be an expert on it.

19 THE COURT: I'll take -- I'll take a simple yes or
20 no. Was there any expert --

21 MR. LINDEN: No there was not, Your Honor.

22 THE COURT: -- that analyzed that pipe on that
23 review board?

24 MR. LINDEN: No, there was not.

25 THE COURT: Okay. I just want to understand the

Defendant's Motion For Summary Judgment 3-15-2012

1 facts.

2 MR. LINDEN: On that Conduct Review Board -- just
3 so to help you further understand the facts, would have
4 been the son's peers, students --

5 THE COURT: Okay.

6 MR. LINDEN: -- and members of the faculty.

7 THE COURT: Okay. Now the members of the faculty
8 and the Dean of Boys, are you saying that they have
9 their own independent experience with controlled
10 substances so that they can identify these items as
11 being illegal?

12 MR. LINDEN: In these times, Your Honor, I think
13 anybody of that age can -- high school students, would
14 be -- anybody who's a teacher in any school in any
15 major metropolitan area would know drug paraphernalia
16 when they see it.

17 THE COURT: How would they know it?

18 MR. LINDEN: How would they know it? It's pretty
19 common in our communities at this stage, Your Honor.

20 THE COURT: Okay. All right.

21 MR. LINDEN: So I'll pick up where you left off
22 with the facts if you don't mind, Your Honor.

23 THE COURT: What, he's placed on probation then in
24 March?

25 MR. LINDEN: Correct.

Defendant's Motion For Summary Judgment 3-15-2012

1 THE COURT: Then he's placed on probation until
2 when?

3 MR. LINDEN: June 4, 2004.

4 THE COURT: Okay. How old are these students when
5 they're senior -- in the senior year?

6 MR. LINDEN: They could be anywhere's from 17, 18,
7 19 years old.

8 Now I'm trying to think of exactly how old Michael
9 Dupree was, because when I took his deposition in the Fall
10 of 2005. 2010, he was 25 years old.

11 THE COURT: Okay. So he was placed on probation
12 until 6-3?

13 MR. LINDEN: 6-4-2004. And notice he was placed
14 on probation was provided in writing by date of letter
15 March 12, 2004 to his parents.

16 THE COURT: What's the reason stated in there?

17 MR. LINDEN: That's Exhibit 4, Your Honor. For
18 the record it says:

19 As you know from our conversation -- this is
20 addressed to Mr. and Mrs. Michael Dupree, his
21 parents, the two other plaintiffs in this
22 case.

23 As you know from our conversation, Michael
24 came before the Conduct Review Board to
25 explain the reason for having a pipe designed

Defendant's Motion For Summary Judgment 3-15-2012

1 for the use of substances in his book bag
2 while at the school.

3 He knows that possessing this type of
4 material violates major school rules.

5 Please refer to page 72 of The Community
6 Handbook.

7 THE COURT: This is the pipe that was not tested
8 we're talking about.

9 MR. LINDEN: That's correct, Your Honor.

10 THE COURT: All right.

11 MR. LINDEN:

12 Michael explained that he was holding onto
13 the pipe for a friend; that he had planned on
14 returning it to his friend later that day
15 after school.

16 Michael's choice of conduct is unsettling.

17 He informed the Committee that he has learned
18 great deal from this and that it is his
19 desire to complete his senior year and earn a
20 diploma from Cranbrook.

21 THE COURT: Which he did. He completed all of his
22 courses and passed all of his examinations as I
23 understand it. Is that correct?

24 MR. LINDEN: He completed all of his examinations,
25 Your Honor. At the time that it was announced that he

Defendant's Motion For Summary Judgment 3-15-2012

1 was going to be dismissed to his parents which would
2 have been May 28, 2004, Your Honor, he had not
3 completed all his course work.

4 THE COURT: Did he eventually complete all his
5 course work?

6 MR. LINDEN: He did eventually complete his course
7 work, Your Honor.

8 THE COURT: Then he was kicked out of school for
9 violating his probation.

10 MR. LINDEN: Correct.

11 THE COURT: What was the violation?

12 MR. LINDEN: The violation was an investigation
13 was triggered by somebody announcing there was
14 something wrong with the computers. It looked as if
15 somebody had accessed other students' computer's
16 information as well as teacher information, as well as
17 exams.

18 A full blown investigation was conducted. A copy of
19 the investigation is attached as Exhibit 5 to our motion
20 for summary judgment.

21 THE COURT: So that was investigated, but not the
22 pipe.

23 MR. LINDEN: Well, the pipe was investigated in
24 the sense, Your Honor, it was discovered on the
25 plaintiff's son.

Defendant's Motion For Summary Judgment 3-15-2012

1 THE COURT: Who said it wasn't his and he was
2 going to give it back to whoever gave it to him.

3 Was that taken into consideration?

4 MR. LINDEN: You heard in the review -- in the
5 letter I read, they heard that at the hearing on the
6 Conduct Review Board.

7 THE COURT: Okay.

8 MR. LINDEN: And factored that into their decision
9 making.

10 Your Honor, in many respects, the situation about the
11 discovery of the pipe in his possession in a lot of ways
12 is no different then our local Police Department pulling
13 somebody over, finding that person in possession of, of a
14 pipe.

15 THE COURT: Don't you have to have an intent to
16 possess something?

17 MR. LINDEN: Well, that's for -- that is for
18 that's -- when we're talking about criminal, which
19 there's, there's a statute. There's elements that have
20 to be proven. There's certain other things that go
21 with that that aren't required here.

22 THE COURT: Basically that's what the standard
23 that was applied to this plaintiff. He had possession
24 of the pipe and that was the end of it. Just like a
25 person who is a convicted felon has possession of a

Defendant's Motion For Summary Judgment 3-15-2012

1 firearm. They all say it's not mine. I didn't know I
2 had it.

3 But the law is if you possess it, you're a convicted
4 felon, you're guilty. That's the same standard that was
5 used on the plaintiff here.

6 MR. LINDEN: Essentially you're correct, Your
7 Honor. Strict liability.

8 THE COURT: Why was -- what was the violation of
9 his probation?

10 MR. LINDEN: The violation of his probation was
11 his -- the investigation led Cranbrook to believe that
12 he was involved in the hacking of computers because
13 most of this information was found on his computer.

14 And the information we're talking about, Your Honor,
15 was passwords for a total of, if I remember correctly, 167
16 students and faculty members' passwords so they could
17 access it. They had accessed exams. And there was also
18 gambling on the Cranbrook --

19 THE COURT: Later you found out that it was
20 somebody else.

21 MR. LINDEN: No. Two people were, were
22 simultaneously -- the plaintiff's son and this other
23 individual were both found out at the same time, both
24 of them were, were dealt with pretty much the same way.

25 THE COURT: So the -- are you saying that the fact

Defendant's Motion For Summary Judgment 3-15-2012

1 that he shared his password in September of '03 had
2 nothing to do with the violating his probation?

3 MR. LINDEN: Your Honor, the fact that he may have
4 shared his password in September of 2003 doesn't
5 relieve him from being punished in May of 2004 for
6 events that might have subsequently occurred from, from
7 giving the password and Cranbrook's discovery in May of
8 2004.

9 THE COURT: I just want to be crystal clear on why
10 he violated his probation.

11 You're saying that there was an investigation done
12 and that he was found to have hacked into the computer
13 system?

14 MR. LINDEN: At a minimum, he was involved in the
15 hacking.

16 THE COURT: This Committee find him guilty of that
17 offense?

18 MR. LINDEN: Yes, they did, Your Honor.

19 THE COURT: I thought -- this is why I'm asking
20 these questions. I thought somebody else confessed to
21 it, said that he was the sole person who did it.

22 MR. LINDEN: No. There's no record evidence of
23 that, Your Honor.

24 THE COURT: So the reason he was violated on his
25 probation was this computer investigation and he was

Defendant's Motion For Summary Judgment 3-15-2012

1 found to have committed that offense.

2 MR. LINDEN: Correct. And the handbook provides,
3 as did the letter putting him on probation, the letter
4 dated March 12, 2004 which is Exhibit 1 to the summary
5 judgment motion, clearly gave him notice that if he
6 violated any other major school rules while on
7 probation, he would be dismissed by June 4.

8 THE COURT: That was the rule he violated?

9 MR. LINDEN: Correct.

10 THE COURT: So his sharing of the password in '03
11 had nothing to do with this?

12 MR. LINDEN: Well, it did in the sense, Your
13 Honor, his accomplice, the person Cranbrook believed
14 that they were acting in concert together, also had his
15 password.

16 So there is a connection there. I can't say there's
17 no connection with the fact that providing the password in
18 September --

19 THE COURT: He had the plaintiff's password.

20 MR. LINDEN: Correct.

21 THE COURT: Why, why is the plaintiff listed as
22 withdrawn instead of kicked out?

23 MR. LINDEN: As the deposition testimony of Arlyce
24 Seibert who's the head of the schools at Cranbrook, as
25 well as I believe Charles Shaw, one of the

Defendant's Motion For Summary Judgment 3-15-2012

1 co-defendants said -- if you look at the transcript
2 which is Exhibit A to our motion for summary judgment,
3 if you look at the first page, there's only two
4 possible notations you can put on there. And it was a
5 computer generated document; either graduated or
6 withdrawn. And so, consequently, you've got the date
7 on there.

8 THE COURT: Who makes that rule?

9 MR. LINDEN: Well, I don't know if it's a rule.
10 It's obviously something Cranbrook --

11 THE COURT: So they could have added booted out if
12 they wanted.

13 MR. LINDEN: If they wanted. But they also
14 explained to the plaintiffs -- as the deposition
15 testimony of the plaintiffs established, before the
16 transcript was issued, that the notation on the
17 transcript was going to indicate withdrawal.

18 THE COURT: Certainly this was not a withdrawal,
19 was it?

20 MR. LINDEN: In a literal sense, no it was not,
21 Your Honor. He was dismissed.

22 THE COURT: He was dismissed, kicked out of
23 school.

24 MR. LINDEN: Correct.

25 THE COURT: So why did they use the word

Defendant's Motion For Summary Judgment 3-15-2012

1 "withdrawal"?

2 MR. LINDEN: Again, Your Honor, as I explained as
3 the witness's testified in this case, this was -- this
4 transcript was computer-generated. And you know --

5 THE COURT: Oh, okay. The answer to that is the
6 computer did it?

7 MR. LINDEN: I'm not going to say that but, but
8 the explanation is computer-generated. There's two
9 choices here.

10 THE COURT: Well that's, that's the choice of the
11 defendant.

12 MR. LINDEN: I would agree with that. I'm not
13 going to quibble with you with that, Your Honor.

14 I'm explaining to you why the notation on the
15 transcript -- there's a date on there. The only things
16 adjacent to the date would be the withdrawal date above
17 that, graduation date.

18 THE COURT: So we can agree that this, this
19 plaintiff did not withdraw from Cranbrook.

20 MR. LINDEN: No. He was dismissed.

21 THE COURT: All right. Would you agree that one
22 of the definitions of withdrawal is the discontinuation
23 of the use of an addictive substance? I just got that
24 from the dictionary.

25 MR. LINDEN: Without seeing that, Your Honor, I'd

Defendant's Motion For Summary Judgment 3-15-2012

1 have to take your word.

2 THE COURT: I think it in American Heritage
3 Collegiate Dictionary. Does that have anything to do
4 with the drug paraphernalia?

5 MR. LINDEN: No it does not, Your Honor.

6 THE COURT: So you're not saying that he was in
7 withdrawal from being addicted to something?

8 MR. LINDEN: Definitely not, Your Honor.

9 THE COURT: But you did say withdrawal.

10 MR. LINDEN: There's a date adjacent to the
11 withdrawal date.

12 THE COURT: But you're not alleging that he's
13 withdrawing from some addiction.

14 MR. LINDEN: Definitely not, Your Honor.

15 THE COURT: Okay. You may continue.

16 MR. LINDEN: All right. So, so just to recap the
17 facts.

18 So March 12, 2004 he's placed on probation. The
19 terms of his probation were spelled out in writing,
20 provided to his parents, explained to him. That's Exhibit
21 1.

22 And as we've just briefly discussed, Your Honor,
23 there's reasons to investigate this computer hacking in
24 the latter part of May, which culminates in a Conduct
25 Review Board hearing regarding his allegedly relating the

Defendant's Motion For Summary Judgment 3-15-2012

1 terms of his probation as a result of his being involved
2 in this computer hacking.

3 THE COURT: What happened to Randy Bruder?

4 MR. LINDEN: Kicked out of school.

5 THE COURT: Did he have a hearing, also?

6 MR. LINDEN: Your Honor, I believe he did, but I
7 don't know that for a fact.

8 THE COURT: Was he on probation?

9 MR. LINDEN: Your Honor, I don't know that.

10 THE COURT: Okay.

11 MR. LINDEN: So the hearing's conducted on
12 May 28th of 2004. The recommendation is based on his
13 violating the terms of his probation, for him to be
14 dismissed from school.

15 The school meets with the plaintiff parents on
16 May 28th, tells them -- informs them that their son's
17 being dismissed from school for violating the terms of his
18 probation.

19 Then on June 1, the formal letter goes out to the
20 plaintiff parents advising them that their son's dismissed
21 from school effective June 1. That, Your Honor, is,
22 again, an exhibit. It's Exhibit 7 to our motion for
23 summary judgment.

24 Graduation for the senior class would be on
25 June 4, 2004.

Defendant's Motion For Summary Judgment 3-15-2012

1 The testimony of Arlyce Seibert which is attached
2 and referenced in our motion for summary judgment
3 indicates for purposes of getting your diploma, being
4 considered to graduate, even if your academic work is
5 done, you must be in good standing to receive your
6 diploma to graduate.

7 In addition to being determined to being in good
8 standing, the faculty votes to issue a diploma the day
9 before graduation, which would have been June 4, 2004.

10 And for purposes of issuing that diploma, the faculty
11 considers the student's academic record as well as their
12 behavior. And there was no vote taken to issue the
13 plaintiff's son because he had already been dismissed.

14 And this is all found in our brief and the deposition
15 testimony of Arlyce Seibert at pages 27, 48, 49 and 54.
16 Those facts have not been disputed.

17 It's also undisputed, based on the testimony of the
18 father plaintiff, that before the transcript that we just
19 got done discussing, Your Honor, was issued with the
20 withdrawal notation on it, the plaintiffs were advised in
21 advance that that was going to happen and an explanation
22 was given that's cited in our brief for reference to the
23 Court. The father plaintiff testified at pages 77 through
24 79 about that.

25 As it is, Your Honor, those facts are undisputed.

Defendant's Motion For Summary Judgment 3-15-2012

1 It's also undisputed that in the Fall of 2004, he,
2 plaintiff, enrolled in Purdue University which he had
3 already been accepted to prior to all this occurring.

4 So, Your Honor, those are the facts and none of those
5 facts have been disputed by the plaintiffs.

6 Now if we talk about the claims, let's first talk
7 about the four federal claims. As I indicated at the
8 beginning of my argument, Your Honor, the plaintiffs
9 surprisingly indicated in their response that they were
10 withdrawing those claims. That's the claims for
11 extortion, wire fraud, mail fraud and RICO.

12 In advance of filing our Motion For Summary Judgment
13 consistent with the local rules, we sought concurrence.
14 It's certified in our motion we've tried to obtain that on
15 March 1. We never got a response to that.

16 The first we ever heard those claims were being
17 withdrawn after having litigated this case and having
18 taken depositions to defend those claims, after spending
19 time in this brief arguing for the dismissal of them, the
20 first time we heard those claims are going to be withdrawn
21 was in response to the Motion For Summary Judgment.

22 THE COURT: When was that filed?

23 MR. LINDEN: The motion for summary judgment?

24 THE COURT: No. When was the withdrawal filed?

25 MR. LINDEN: There's never been a withdrawal

Defendant's Motion For Summary Judgment 3-15-2012

1 formally filed.

2 If we're talking about in terms about compliance with
3 Federal Rule of Civil Procedure 41 which would have
4 been --

5 THE COURT: So you sought concurrence the day
6 before you filed the motion, right?

7 MR. LINDEN: I don't recall the day. I got the
8 docket record report here.

9 My review of the record that would be correct, Your
10 Honor.

11 THE COURT: Okay.

12 MR. LINDEN: And regardless, Your Honor,
13 depositions were taken in this case. For example,
14 depositions of the plaintiffs. Considerable time was
15 spent on those claims deposing the plaintiffs.

16 So the federal claims from defendant's perspective,
17 given the plaintiffs essentially abandoned them for those
18 reasons, they should be dismissed.

19 To the extent the Court's not going to give those
20 reasons credence for dismissing the claims, the reasons
21 otherwise stated in our brief warrant granting summary
22 judgment on the federal claims. I'll quickly go through
23 the reasons for that, Your Honor.

24 First of all in the RICO claim, the law is pretty
25 settled there's a four year statute of limitations. This

Defendant's Motion For Summary Judgment 3-15-2012

1 lawsuit was not filed until May of 2010.

2 THE COURT: These claims have been withdrawn.

3 MR. LINDEN: Okay.

4 THE COURT: We don't have to talk about them.

5 MR. LINDEN: I'll quickly move into the two
6 remaining claims, Your Honor.

7 So we got claims of one fraud and misrepresentation
8 and second breach of contract. Let's talk about the fraud
9 and misrepresentation claim.

10 So the premise, the premises for that claim is,
11 number one, that there was a false representation made
12 with regard to the withdrawal notation on the transcript.

13 And, number two, that that if the plaintiff satisfied
14 his academic requirements, he would have automatically
15 gotten his diploma and be deemed to graduate.

16 So on the withdrawal aspect, Your Honor, both sides
17 agree on what the elements are for fraud and
18 misrepresentation claim.

19 And the elements for that claim would be the
20 defendants must have made a material misrepresentation, it
21 was false.

22 Third, when the defendants made the representation,
23 they knew it was false or made it recklessly without any
24 knowledge of his truth.

25 Number four, defendants made it with the intention it

Defendant's Motion For Summary Judgment 3-15-2012

1 would be acted upon by plaintiffs.

2 Five, plaintiffs acted in reliance upon it. And
3 last, plaintiffs suffered injury.

4 So I'm going to focus on the last three elements of
5 the fraud.

6 THE COURT: We really don't need to go into this,
7 this issue. Why don't you go into the contract issue.

8 MR. LINDEN: Okay. On the contract claim, Your
9 Honor, as you noted at the beginning of this argument,
10 the contract provides that Cranbrook reserved the
11 discretion that if the student was not satisfactorily
12 meeting the expectations, they could dismiss the
13 student at any time.

14 Contract also specified that as a condition of
15 enrollment, the student had to comply with the code of
16 conduct, among other things in the handbook.

17 The facts as established here, Your Honor, are, A,
18 the plaintiff violated the code of conduct. He was
19 subject to two Conduct Review Board hearings. First,
20 putting him on probation.

21 The second one adjudicating his violation of the
22 probation; and as a result, he was terminated.

23 Cranbrook's actions were clearly in conformity with
24 the contract. There's no evidence that they breached the
25 contract. And as it is, the contract theory of the

Defendant's Motion For Summary Judgment 3-15-2012

1 plaintiff is predicated on the notion that the plaintiff's
2 son satisfied the academic requirements he would get the
3 degree and diploma.

4 The contract is very clear, Your Honor. It doesn't
5 say if you satisfy the academic requirements, you get a
6 degree and diploma. There were these other things that we
7 just talked about.

8 So, consequently, we submit, Your Honor, the
9 plaintiff cannot make out there breach of contract claim.

10 As it is, Your Honor, for what it's worth on the
11 breach of contract claim, the, the only proper parties for
12 that claim would be the father, because he's the only
13 party to that contract with the school. The other
14 plaintiffs and the defendants really have no bearing on
15 that claim.

16 So I guess, Your Honor, unless you have any other
17 questions for the reasons I've stated, for the reasons
18 stated in our brief, the defendants respectfully request
19 that Motion For Summary Judgment be granted.

20 THE COURT: Okay. Thank you.

21 MR. LINDEN: You're welcome.

22 THE COURT: Mr. Sciotti?

23 MR. SCIOTTI: Thank you, judge.

24 If it please the Court, judge, the only relief we're
25 requesting is that the Court enter an order compelling the

Defendant's Motion For Summary Judgment 3-15-2012

1 defendants to issue him a diploma.

2 We have a motion to allow us to file an amended
3 complaint asking for equitable relief, but I'll address
4 the issues here.

5 Let's look at the facts of what happened to this
6 really child actually. He completed all his requirements.
7 He's placed on probation in March '04 for possession of a
8 pipe.

9 They didn't do any testing they assumed it was drug
10 paraphernalia. So he's placed on probation and the
11 parents are sent a letter that your son, Michael, is
12 placed on probation.

13 The violation that they charged him with occurred six
14 months before and so they backstopped it. He didn't like
15 violate his probation after he was placed on probation.
16 They're claiming, no, you violated your probation six
17 months before.

18 THE COURT: That's what I was asking counsel for
19 the defendant. And he says, no, that, that's not the
20 fact. He's claiming that he violated his probation by
21 hacking into the school computer system.

22 MR. LINDEN: No. The violation of probation was
23 giving his password six months before to Randy Bruder.

24 THE COURT: What evidence do we have of that?
25 That's what I was -- that's what was my belief.

Defendant's Motion For Summary Judgment 3-15-2012

1 Then when I asked the direct question, I didn't get
2 that answer.

3 MR. LINDEN: Judge, I -- I can point -- I didn't
4 expect that question because I thought that was
5 settled. I thought that was a settled fact, because
6 that's what they violate, his probation, when he gave
7 his password with Cranbrook's consent, he gave it to
8 him for a few days with Dr. Lamm's consent.

9 THE COURT: What evidence do you have of that, of
10 Dr. Lamm's consent?

11 MR. LINDEN: Just the plaintiffs, the plaintiff's
12 deposition.

13 THE COURT: All right.

14 MR. LINDEN: We didn't take Dr. Lamm's deposition.

15 THE COURT: Okay.

16 MR. LINDEN: The plaintiff's deposition.

17 But that was the violation was that he gave his
18 password out six months before this and that Randy Bruder
19 he, he was the -- there was no evidence, actual evidence,
20 that Michael Dupree, Junior, hacked into anything. He did
21 give his password. He admitted it. He doesn't even try
22 to hide it. He gave his passwords six months before with
23 Dr. Lamm's consent. They used this after March, after the
24 probation six months before to dismiss him from school.

25 He had completed all of his requirements. He was --

Defendant's Motion For Summary Judgment 3-15-2012

1 he was done. He completed all his classes. And what the
2 defendants want the Court to do under his breach of
3 contract what's the standard here? They can act
4 arbitrarily, capricious. There's no standards. They
5 could do whatever they like.

6 THE COURT: That's why I asked the question.

7 MR. LINDEN: I understand that. That's their
8 answer. They can do whatever they like to dismiss
9 this. All we're asking is that the Court issue Michael
10 Dupree a diploma. His parents paid over \$80,000 for
11 his education. He completed all of his requirements.
12 And there was I -- I mean for a pipe that they didn't
13 test and forgiving a password that they agree that he
14 could give the password to.

15 And I want to address the transcript because --
16 however you look eight that transcripts a fraud, however
17 you look at it.

18 He never withdrew. They sent to many colleges.

19 THE COURT: Did your client rely on this
20 withdrawal business?

21 MR. LINDEN: Let's let me answer it this way. He
22 had to rely on it because that was his official
23 transcript. My clients objected to that transcript
24 from the get go.

25 When they -- Mr. Dupree, senior, testified that when

Defendant's Motion For Summary Judgment 3-15-2012

1 he learned that they were going to put withdrawal on there
2 because that's what he told them he objected. He objected
3 several times, so they were forced to rely on it.

4 When transcripts went to various colleges,
5 Mr. Dupree, Jr. he would have to explain, no, I never
6 withdrew, I was dismissed and then I got my GED.

7 So when, when counsel said he was accepted at Purdue,
8 he was accepted at Purdue with the idea that he was going
9 to graduate from Cranbrook.

10 When he got dismissed he -- his Mom called Purdue,
11 that's in the deposition. They said, well, if he gets his
12 GED, then we'll accept him. So he had to get some type of
13 diploma.

14 All we're asking here is -- they refused to correct
15 that transcript. And I think that the idea that this was
16 computer generated is just so disingenuous.

17 So what if it's computer generated, it's the
18 defendant's document. Change it. You can put dismissed
19 on there. You don't have to go graduation date or
20 withdraw. Tell the truth. They didn't tell the truth.

21 THE COURT: What are the damages you're seeking in
22 this case?

23 That's all you're seeking?

24 MR. LINDEN: That's all I'm seeking, judge.

25 THE COURT: Okay.

Defendant's Motion For Summary Judgment 3-15-2012

1 MR. LINDEN: He's entitled to a diploma.

2 THE COURT: What happened to your client, did he
3 graduate from college?

4 MR. LINDEN: My client has graduated from college.
5 He lives in Denver. He attended various colleges.

6 I believe it's in my brief, but that transcript went
7 out to -- eight, nine or ten colleges. That he applied
8 to. He went to various colleges and now I believe he's
9 running his own business.

10 I understand that not every harm results in a remedy.
11 Governmental immunity. There's a lot of things. But in
12 this case, they want the Court to assume on their breach
13 of contract that they can dismiss for whatever reason.
14 And that's not right. And it's not right that they that
15 transcript was a fraud. That's not right either and my
16 client deserves a diploma. He completed all his
17 requirements.

18 THE COURT: Okay.

19 MR. LINDEN: Thanks, judge.

20 THE COURT: Thank you, counselor.

21 Mr. Linden, we'll give you the last word. Couple
22 minutes if you want a rebuttal.

23 MR. LINDEN: Thank you, Your Honor. I appreciate
24 it.

25 THE COURT: Why didn't you give a diploma; what

Defendant's Motion For Summary Judgment 3-15-2012

1 difference would it make? He completed all his work,
2 paid his money, passed his tests.

3 MR. LINDEN: Because my client, Your Honor,
4 exercised its rights consistent with the contract. I
5 guess I want to quickly respond to a half dozen points
6 raised by plaintiff's counsel.

7 THE COURT: All right.

8 MR. LINDEN: First of all with regard to the
9 request for specific performance. You know as we
10 indicated, Your Honor, there's, there's no -- there's
11 no such claim pending before this Court.

12 There was an attempt to file an amended complaint in
13 the Fall of 2010. The judge then assigned to the case
14 struck the stipulated order allowing for amendment.

15 THE COURT: Who was that? Was that Judge Cleland?

16 MR. LINDEN: I believe it was Judge Cleland.
17 There was Judge Cleland, Edmunds.

18 THE COURT: So this case has been reassigned a
19 couple times.

20 MR. LINDEN: You're the third judge.

21 THE COURT: Not originally assigned to me.

22 Does the plaintiff have a motion to file an amended
23 complaint? Do you have one right now? I mean is there
24 one pending?

25 THE CLERK: Yes, there is one.

Defendant's Motion For Summary Judgment 3-15-2012

1 THE COURT: Thank you. That answers that
2 question. Go ahead.

3 MR. LINDEN: I know for the record the notice of
4 appearance today was for purposes of summary judgment
5 only.

6 THE COURT: Right.

7 MR. LINDEN: Secondly, this motion -- that the
8 fact that he gave the password in September of 2003
9 somehow gives him a free pass I think is really
10 misleading in this respect, Your Honor.

11 You start with the fact that it's undisputed he gave
12 the password. Plaintiff's counsel, in fact, acknowledged
13 that. The fact he's put on probation in March of 2004
14 didn't give him amnesty for any other misconduct he
15 engaged in.

16 THE COURT: Are you claiming that he could use the
17 password sharing in September of 2003 to violate his
18 probation that was started in March of '04?

19 MR. LINDEN: There's a big if, Your Honor. If it
20 was subsequently discovered. It wasn't just merely
21 giving the password, but there was some other
22 misconduct connected to it.

23 THE COURT: We have these cases all the time in
24 the criminal context and it's pretty much given that
25 you're not going to be able to violate anybody's

Defendant's Motion For Summary Judgment 3-15-2012

1 probation or supervised release for an act that was
2 committed prior to the commencement of probation or
3 supervised release. That's pretty much standard
4 equipment.

5 MR. LINDEN: That's standard equipment in that
6 universe, Your Honor. I submit there's a different
7 rules -- different set of rules that apply in a school
8 setting.

9 THE COURT: Why?

10 MR. LINDEN: U.S. Supreme Court for example in the
11 context of search and seizure.

12 THE COURT: If those kind of rules apply to
13 criminal defendants, are you saying that they don't
14 apply to students?

15 MR. LINDEN: I'm saying that's correct, Your
16 Honor. What I just alluded to is the Supreme Court,
17 for example, in the realm of the Fourth Amendment has
18 made a distinction between a criminal who's entitled to
19 certain procedural niceties under the Fourth Amendment
20 a student would not necessarily get it once they step
21 into the school house.

22 THE COURT: Is that what you teach at Cranbrook
23 that criminals have more rights then students at
24 Cranbrook?

25 MR. LINDEN: If they're teaching constitutional

Defendant's Motion For Summary Judgment 3-15-2012

1 law, Your Honor, they probably do. For example, if I
2 remember U.S. Supreme Court case --

3 THE COURT: Do you advertise that in your
4 advertisement to try to get students into the school?

5 MR. LINDEN: I don't know what advertisements
6 Cranbrook do, Your Honor.

7 THE COURT: All right.

8 MR. LINDEN: So coming back to the password, we
9 attached as an exhibit, Your Honor, I believe it was
10 exhibit -- just want to get the number. So Exhibit 5
11 is the investigative -- the report of the investigation
12 regarding the hacking.

13 If you look at it, Your Honor, it says based on the
14 request for the IT to investigate the network and H drive
15 activity of two students, specifically the other students
16 name is redacted out for that student's protection and
17 Michael Dupree, the IT team discovered the following
18 information. And there's a list of offenses involved
19 here.

20 So you got evidence of a creation of a decoy
21 to obtain other people's passwords, at least
22 167 faculty and classmen freshman,
23 sophomores, *et cetera*, I.D.'s and passwords
24 are documented in an Excel Spreadsheet found
25 in a directory located in Michael Dupree's

Defendant's Motion For Summary Judgment 3-15-2012

1 network storage.

2 Based on information received, evidence from
3 the school's faculty and files on students H
4 drives, IT was able to determine, identify
5 specific machines used for testing and
6 deployment of the decoy log in process.

7 At some point in time, a subdirectory named
8 spicer existed and has been since deleted on
9 Michael Dupree's H drive. Evidence of online
10 activity was also found in Michael's account,
11 such as log in information passwords and
12 account totals.

13 So this all came to Cranbrook's attention. They
14 acted on it, they had their Conduct Review Board and
15 deemed that he violated his probation.

16 Then the next point I want to address, because I've
17 heard it in plaintiff's counsel's argument, I've also
18 heard Your Honor use this term, this notion of Cranbrook
19 acted arbitrarily and capriciously by dismissing the son
20 plaintiff.

21 THE COURT: I didn't say that. I asked you a
22 question, a general question at the beginning of your
23 argument whether or not you believed, under the terms
24 of that contract, that you could dismiss any student at
25 any time for any reason satisfactory to you, to your

Defendant's Motion For Summary Judgment 3-15-2012

1 client. You said yes.

2 MR. LINDEN: I apologize, Your Honor.

3 THE COURT: I did not, I did not say anything
4 about the plaintiff in this case at all.

5 MR. LINDEN: All right. So what I want to come
6 back to again is some basic concepts of American law.

7 A contract is a contract. And it's enforceable
8 unless it's an illegal contract. To an extent a contract
9 is being applied in an illegal way such as you were asking
10 my questions about what if decided to dismiss somebody
11 because they had facial hair or some other thing.

12 THE COURT: Let's say a tattoo that they didn't
13 like.

14 MR. LINDEN: Right. The avenue for recourse there
15 would be to challenge it on some other basis.

16 Again, anybody can have a contract that grants them
17 unfettered discretion to terminate it or to take other
18 steps under it so long as it's not for illegal reasons.

19 And to the extent there's a notion that, somehow,
20 they acted arbitrary and capriciously here, Your Honor,
21 many of the facts we talked about here are undisputed.

22 It's undisputed he had pipe in his possession which
23 leads me to the other thing I want to reference.

24 No where is there a requirement whether it's in the
25 handbook or as a matter of law that Cranbrook had to

Defendant's Motion For Summary Judgment 3-15-2012

1 conduct a test to determine that pipe had been used for
2 drugs before it could -- it could act pursuant to its code
3 of conduct.

4 THE COURT: So then they could have put him on
5 probation for having a toothbrush in his backpack,
6 right?

7 MR. LINDEN: Well, Your Honor, again --

8 THE COURT: How about dental floss? Would they
9 put him on probation for that?

10 MR. LINDEN: I would submit, Your Honor, no
11 reasonable person would take the position that dental
12 floss is drug paraphernalia.

13 THE COURT: Well wait a minute. Wait a minute.
14 Don't say that. There could be dental floss tainted
15 with crack cocaine. Haven't you heard of that?

16 MR. LINDEN: No it's the first time I've heard
17 that, Your Honor.

18 But to the extent you talk about that hypothetical
19 situation that's what was found in the plaintiff's son's
20 book bag.

21 THE COURT: They would have had to test that,
22 though, wouldn't they?

23 MR. LINDEN: They may not have.

24 THE COURT: Or would the Dean of Boys know about
25 that?

Defendant's Motion For Summary Judgment 3-15-2012

1 MR. LINDEN: They might not have known about that.

2 THE COURT: That's my point. I don't know how the
3 Dean of Boys knows about all these things.

4 MR. LINDEN: Okay. Regardless, Your Honor, they
5 were acting within their proper discretion as set forth
6 in their handbook and their conduct --

7 THE COURT: Isn't there a body of law that says
8 that when you're enforcing a contract or any other like
9 obligation you must do it in good faith? Is there a
10 body of law like that?

11 MR. LINDEN: There may be; it depends on the type
12 of contract we're talking about, Your Honor.

13 Let's assume, let's assume here for a moment there's
14 an obligation to, to enforce the contract in a good faith
15 manner. So I submit, Your Honor, the facts that were
16 talked about today fully establish Cranbrook acted in good
17 faith.

18 THE COURT: Okay.

19 MR. LINDEN: They acted in good faith, they
20 followed their procedures, they conducted a Conduct
21 Review Board. There's no evidence that there was any
22 bias or anything else irregular about that process.
23 Same thing with the -- determining him having violated
24 the probation.

25 Consequently, Your Honor, there's no evidence of bad

Defendant's Motion For Summary Judgment 3-15-2012

1 faith here to the extent there was a requirement.

2 And so the last thing I want to address, Your Honor,
3 is this motion of reliance, because I think it's important
4 to perhaps end on this note.

5 Plaintiff's testimony establishes that immediately
6 after getting dismissed from school, he got this GED in
7 June 2004.

8 It's uncontested he'd already been accepted at
9 Purdue, that he attended in the Fall of 2004.

10 It's also undisputed as the briefs establish, Your
11 Honor, that after leaving Purdue after being there for a
12 brief period of time he, he stopped Purdue because he
13 supposedly became ill and moved to California. He then
14 was able to get into five other colleges, the last one
15 being he graduated from.

16 THE COURT: That was because of the stress imposed
17 on him by not receiving his diploma?

18 MR. LINDEN: There's no testimony to support that.

19 THE COURT: I'm curious about why you placed that
20 in your brief. I was going to ask you that. Thank you
21 for bringing that up.

22 What difference does it make if he dropped out of
23 Purdue and then dropped out of five other colleges?

24 MR. LINDEN: Here's where it will make a
25 difference, Your Honor.

Defendant's Motion For Summary Judgment 3-15-2012

1 The testimony was he was unable to identify any
2 college that he could not get into as a result of that
3 transcript having a withdrawal notation on it, including
4 the five colleges that he subsequently attended after
5 Purdue.

6 THE COURT: Do you agree with counsel for the
7 plaintiff that he had to go in explain all of this
8 business about withdrawal?

9 MR. LINDEN: Your Honor, there's no record in
10 support of that that I've heard. And to the extent he
11 needed to do that, it didn't, it didn't prevent him
12 from getting into any of these schools, Your Honor. He
13 got into these schools.

14 THE COURT: How do you know there were schools he
15 didn't get into?

16 MR. LINDEN: Because he testified he could not --
17 he was unable to identify -- I asked him these
18 questions in his deposition. He was unable to identify
19 any college he did not apply to because either he had
20 to get a GED or there was a withdrawal notation on his
21 deposition. That's found in our brief at page ten
22 footnote ten.

23 THE COURT: Okay.

24 MR. LINDEN: That's it, Your Honor.

25 THE COURT: Thank you, counselor.

Defendant's Motion For Summary Judgment 3-15-2012

1 MR. LINDEN: Thank you.

2 THE COURT: I'd like to thank both counsel for
3 their presentations, for their excellent briefs and
4 take this matter under advisement. I want to review
5 the briefs again.

6 And, last but not least, Ms. Mahoney, you have said
7 nothing in this whole hearing.

8 Would you like to place something on the record?

9 MS. MAHONEY: I'd like to say thank you for having
10 us today. It's a beautiful courthouse. I've not been
11 in this courthouse before.

12 THE COURT: Glad to have you. Thank you very
13 much. We're in recess.

14 (Whereupon this hearing
15 then concluded at 11:54 a.m.)

16
17 CERTIFICATE OF COURT REPORTER

18
19
20 I certify that the foregoing is a correct transcript
21 from reported proceedings in the above-entitled
22 matter.

23
24
25 s/Carol S. Sapala, FCRR, RMR May 2, 2012